Nos. 11485-11486.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of Herbert G. Rell, Bankrupt,

Appellee.

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of Lovina Rell, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

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APPELLEES' BRIEF.

Statement of the Case.

The statement of the case as set forth in appellant's opening brief is essentially correct, but certain observations should be made to clarify the statement in so far as the appellee's contentions are concerned. Pages 4 and 5 of the brief recite that the appellant was to lend funds to enable the bankrupts to pay the *full* purchase price demanded by the vendor. This is not a correct statement of the facts. [Tr. pp. 16, 24, 29.] From the references to

the transcript it is to be noted that only a part of the purchase price was to be loaned to the bankrupts by the appellant, and the sum of $1,000.00 was to be paid outside of escrow to the vendor Wilson. In addition to such payment the bankrupt executed and delivered a promissory note for $1,000.00 outside of escrow in favor of the vendor Wilson, which promissory note was secured by a second chattel mortgage reciting therein that it was to be junior to the chattel mortgage of the appellant.

Included within the security described in the chattel mortgage in question [Tr. p. 32] are a Plymouth Sedan automobile and a Willys Pick-up truck, which vehicles were not being purchased by the bankrupts from the vendor Wilson. [Tr. p. 21.] The bankrupts were the owners of the Plymouth Sedan automobile prior to the execution of the chattel mortgage, to-wit, May 4, 1945, and, at the same time the Willys Pick-up truck was being acquired by the bankrupts. These are important distinctions, as will subsequently appear from the appellee's argument.

A further observation is made relative to the statement of the case (App. Br. p. 5) referring to the escrow depository. At all times it should be remembered, in considering the position of the appellant, that a department of the appellant acted as the escrow depository over which the appellant had complete control, and any dereliction on the part of the escrow depository in not properly handling the chattel mortgage in question as required by the laws of California must, of necessity, be attributed to the appellant. The fiction of two arms operating independently under one head should not be indulged in to excuse the failure on the part of the appellant in handling the chattel mortgage.

ARGUMENT.

I.

The Law Relative to Chattel Mortgages Must Be Strictly Construed.

Any person who claims a lien upon personal property as security for a debt must conform strictly with the statutes giving rise to such lien, and failure to so conform will render a chattel mortgage invalid as against claims of creditors of the mortgagor.

> "The authority for the creation of Chattel Mortgages in California derives its force from the statutory provisions relating to the subject, and all rights accruing by virtue of such mortgage can be protected and conserved only by fully meeting the requirements of the statute and strictly observing its provisions."
>
> 5 *Cal. Jur.* 50;
>
> *Hopper v. Keys,* 152 Cal. 488, 92 Pac. 1017.

The following is a quotation from Judge James' opinion in *In re Fox West Coast Theatres,* 4 Fed. Supp. 692:

> "It is held by the California Courts that the provisions of the law as to the contents of a Chattel Mortgage are applied strictly and that the Mortgagee must see that they are complied with at the penalty of loss of his security as against claims of creditors of the lessee." (Mortgagor) citing, *Kahriman v. Jones,* 203 Cal. 254, 263 Pac. 537.

In the recent California case of *Rolando v. Everett,* 72 Cal. App. (2d) 629, 165 P. (2d) 33, decided on January 22, 1946, the validity of a chattel mortgage as against creditors of the mortgagor was attacked on the ground that the form of acknowledgment used in the execution

of the chattel mortgage executed by a partnership did not conform with the statutory requirement. The Court discussed the form of acknowledgment used which was the ordinary form of acknowledgment prescribed by Section 1189, Civil Code of the State of California, and discussed the form prescribed by Section 1190a of the Civil Code and concluded that there had not been a substantial compliance with the statutory provision. As a result the chattel mortgage was held to be void as against creditors of the mortgagor.

This most recent case reemphasizes the strict compliance with the laws of the State of California required to give effect to a Chattel Mortgage as against creditors of a Mortgagor. The above citations and quotations have been set forth herein as the primary basis for the Trustee's contention that the subject chattel mortgage is void as to the trustee in bankruptcy. Regardless of the excuses given by the appellant for the failure to strictly comply with the California laws in the execution and recording of its chattel mortgage, there appears to be no escape from the strict application of those laws.

II.

The Chattel Mortgage Is Not a Purchase Money Mortgage.

In commercial practice a purchase money mortgage is considered to be one given by a vendee to a vendor as payment or consideration for the property purchased. Thus, A sells property to B, and, in lieu of paying cash therefor, B executes a promissory note secured by a chattel mortgage on the actual property so sold. The facts in the instant case disclose that part of the property, excluding the 1936 Plymouth Sedan automobile and the 1936

Willys Pick-up truck, was sold to the bankrupts for which a consideration was paid to the vendor. A further and additional consideration was paid by the bankrupts to the vendor in the sum of $2,000.00, represented by $1,000.00 in cash and a promissory note secured by a junior chattel mortgage for an additional $1,000.00. However, in the preparation of the chattel mortgage, the appellant included all of the property that the bankrupts owned or intended to acquire, and the result was that the chattel mortgage was removed from the category of a purchase money mortgage, hence, the case of *Rosom Utilities,* 105 F. (2d) 132 is not applicable. Furthermore, the strict construction placed by the California courts upon the execution of chattel mortgages would strongly indicate that even as regards a purchase money mortgage the letter of the statute must be followed to make it effective as against creditors of the mortgagor. The case of *Rolando v. Everett,* 72 Cal. App. (2d) 629 is the latest and strongest statement of strict construction, turning upon a bare technicality which supports the appellee's contention that purchase money mortgages are no exceptions to the laws pertaining to their execution and recording. Sections 2957 and 3440 of the California Civil Code have been on the statute books for many years. Likewise purchase money mortgages have been in commercial use for as many years. The California legislature during all of this time could have included within the statutes pertaining to chattel mortgages an exception in so far as purchase money mortgages are concerned, but even though the California Appellate Courts have repeatedly construed with strictness these laws pertaining to chattel mortgages, the legislature has not seen fit to exclude from their operation a purchase money mortgage. However desirable, it does not

seem to be within the province of the California Appellate Courts to legislate upon the subject of chattel mortgages, and, particularly in view of the fact that chattel mortgages are in derogation of the common law. Any legislation thereon should emanate from the proper legislative body.

III.

Failure to Publish a Notice of Intention to Chattel Mortgage Renders the Chattel Mortgage Void as to Existing Creditors of the Mortgagor.

It is clear that a notice of intention to chattel mortgage was not published in a newspaper of general circulation within the township in which the chattel mortgage was made. Such a requirement is contained in Section 3440 of the California Civil Code as amended by the Statutes of 1945, Ch. 1071, Sec. 1.

Undoubtedly the appellant intended to publish such a notice [Tr. p. 17] but for some unexplained reason it failed. Perhaps the hundreds of automobile loans secured by chattel mortgages then being handled by the appellant [Tr. p. 19] might account for the oversight in this particular case. Nevertheless, this failure is sufficient in itself to render the chattel mortgage void, in so far as it pertains to the fixtures or equipment of a garage owner; in other words, all of the property described in the chattel mortgage except the three automobiles.

A recent California case, *Malaquias v. Novo*, 59 Cal. App. (2d) 225, 138 P. (2d) 729, holds that a conveyance is void for failure to publish a copy of the notice of sale in a newspaper of general circulation as required by Section 3440, California Civil Code. The same authority would apply in the case of a chattel mortgage.

IV.

Unless a Chattel Mortgage Is Recorded Immediately Following Its Execution It Shall Be Void as to Creditors of the Mortgagor.

The chattel mortgage involved herein was executed on May 4, 1945, and was recorded in the office of the County Recorder of Los Angeles County on May 24, 1945. (App. Br. p. 7.) Such a delay from the date of execution to the date of recording has been held sufficient to render a chattel mortgage void as to creditors:

Williams v. Belling, 76 Cal. App. 610, 245 Pac. 455 (14 days delay);

Swift v. Higgins (C. C. A. 9), 72 F. (2d) 791 (28 days delay);

In re Hansen, 268 Fed. 904 (1 month and 12 days delay).

V.

The Trustee Has a Right to Contest the Validity of the Chattel Mortgage.

At the time of the execution of the chattel mortgage involved, the bankrupts were indebted to various creditors. [Tr. p. 20.] The transcript citation discloses that through inadvertence the word "trustee" was used in the stipulation when it should have been the word "bankrupt." This was an oversight that was corrected by interlineation in the proceedings before the lower court, but apparently has not been corrected for the purposes of this appeal. Hence, the transcript, page 20, should read

> "'it is further stipulated by and between the parties, through their respective counsel, that there is on file in these proceedings schedules of the *bankrupts* listing claims of certain creditors which purport to have

existed prior to the giving of the chattel mortgage herein."

A trustee in bankruptcy represents all of the creditors, and a chattel mortgage which is void, is void as to creditors who became such subsequent to its recording, as well as those existing prior to its recording. (*Moore v. Bay,* 284 U. S. 5; 76 L. Ed. 133; 76 A. L. R. 1200.)

VI.

The Failure to Properly Record the Chattel Mortgage With the California Department of Motor Vehicles Renders It Void as to Existing Creditors.

The facts pertaining to the deposit with the Department of Motor Vehicles for the State of California of a certified copy of the chattel mortgage are somewhat vague. The appellant attempted to disclose these facts from its records, and called upon one of its employees to give his best recollection of what transpired. [Tr. pp. 18, 19 and 20.] While it does not appear in the stipulated facts, it is counsel's recollection that the certificate of ownership covering the Ford truck described in the chattel mortgage was in the possession of the appellant on May 21, 1945, at which time it could have been sent to the Department of Motor Vehicles together with a certified copy of the chattel mortgage. Apparently the appellant desired to send all three certificates of ownership together with one certified copy of the mortgage and waited until June 8, 1945 to do so. Following that date, and on June 29, 1945, the appellant was notified by the Department of Motor Vehicles that there was some defect in the recording of the chattel mortgage, either in the amount of fees deposited, or in the nature of the endorsements on the docu-

ments. [Tr. p. 19.] Whether the chattel mortgage and the certificates of ownership were then returned to the appellant is not clear. The fact remains that the appellant does not appear to have been registered as the legal owner of the three motor vehicles in the Department of Motor Vehicles, Sacramento, California, until July 20, 1945.

The various delays involved in finally registering the appellant as the mortgagee-legal owner with the California Motor Vehicle Department may be summarized as follows:

1. May 4, 1945 (date of execution and acknowledgment of mortgage) to July 20, 1945 (date appellant appears registered as legal owner with Motor Vehicle Department) . . . 2 months, 16 days delay.

2. May 21, 1945 (date certificate of ownership for Ford truck came into possession of appellant) to July 20, 1945 (date appellant appears registered as legal owner of Ford truck with Motor Vehicle Department) . . . 1 month, 29 days delay.

3. June 8, 1945 (date three certificates of ownership and certified copy of Chattel Mortgage were first mailed to Motor Vehicle Department) to July 20, 1945 (date appellant appears registered as legal owner of three motor vehicles with Motor Vehicle Department) . . . 1 month, 12 days delay.

4. June 29, 1945 (date of last notice to appellant that the registration of chattel mortgage was defective) to July 20, 1945 (date appellant was registered as legal owner) . . . 21 days delay.

The authorities are clear in California that a chattel mortgage on an automobile must be recorded promptly and failure to so record it renders it void as to all creditors, whether the debts were incurred prior to or subsequent to its execution.

National Bank of Bakersfield v. Moore, 247 Fed. 913.

Bank of America v. Sampsell, 114 F. (2d) 211 (C. C. A. 9).

Nor shall a chattel mortgage be valid until the mortgagee is registered as the legal owner.

Vehicle Code, State of California, Sec. 195;

Eckhardt v. Morley, 220 Cal. 229, 30 P. (2d) 423;

Chilhar v. Acme Garage, 18 Cal. App. (2d) (Supp.) 775, 61 P. (2d) 1232.

Again applying the principle of strict construction as quoted above in *Hopper v. Keys,* and in 5 Cal. Jur. 50, the burden was upon the appellant to strictly comply with the provisions of Section 195, California Vehicle Code.

Conclusion.

From all of the facts available it would seem to be apparent that the appellant has not been vigilant in protecting its rights as a secured creditor under the chattel mortgage in question. Certainly it had every opportunity to comply with the law pertaining to the execution and recording of chattel mortgages. It had complete control of the escrow and it could have required the parties involved to do anying it deemed necessary to make itself secure. There appears to be no reason why the chattel mortgage should have been executed on the date that it bears, to-wit, May

4, 1945. Its execution could have been withheld until notice of intention to execute had been duly published and until the certificates of ownership covering the three motor vehicles were in the possession of the escrow holder to be thereafter promptly deposited with the Motor Vehicle Department along with a certified copy of the chattel mortgage and the requisite fees. The failure to comply with the law is directly attributable to the appellant and its agents. Such failure to do all that the law required in the execution and recording of the chattel mortgage is sufficient to invalidate it as to creditors now represented by the trustee in bankruptcy.

Respectfully submitted,

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